

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MITCHELL CUPP, #1250518,
Plaintiff,

v.

ROCKY CLAYTON, et al.,
Defendants.

)
)
)
)
)
)
)

USDC 3:04-CV-953-P
USCA 06-11186
ECF

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Pursuant to the provisions of 28 U.S.C. § 636(b) and an order of the District Court filed on December 8 and 15, 2006, Plaintiff's motion for leave to proceed *in forma pauperis* on appeal, filed on November 29, 2006, and the issue of the timeliness of the filing of the notice of appeal, remanded from the Fifth Circuit and filed in this Court on December 11, 2006, have been referred to the United States Magistrate Judge for recommendation. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

On December 5, 2006, the United States Court of Appeals for the Fifth Circuit remanded this case to determine whether Plaintiff delivered his notice of appeal to prison officials for mailing on or before October 20, 2006.

In response to this Court's request, Law Librarian Tony Pate at the T.L. Roach Unit sent a letter with a copy of the Roach Unit's prison mail log for the period from October 16, 2006, until October 24, 2006. (Docket #82). The mail log reflects that on October 19, 2006, Plaintiff delivered legal mail addressed to this Court to the Roach Unit mailroom. (*Id.*).

In light of the above, the Court concludes that Petitioner's notice of appeal was deposited in the prison mailing system on October 19, 2006, before the October 20, 2006 deadline. See *Houston v. Lack*, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Accordingly, it was timely filed.

RECOMMENDATION:

For the foregoing reasons, it is recommended that Petitioner's notice of appeal was TIMELY filed and that this case be returned to the Fifth Circuit for further proceedings.

Signed this 18th day of January, 2007.

A handwritten signature in black ink that reads "Wm. F. Sanderson, Jr." The signature is written in a cursive, slightly slanted style.

WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten-day period may bar a *de novo* determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.